

LOOKOUT MOUNTAIN
MINING & MILLING CO. ET AL.

IBLA 94-529, etc.

Decided July 31, 1997

Appeals from Decisions of the Idaho State Office, Bureau of Land Management, declaring mining claims abandoned and void. IMC 31880, etc.

Affirmed.

1. Mining Claims: Abandonment--Mining Claims: Rental
or Claim Maintenance Fees: Generally--Mining Claims:
Rental or Claim Maintenance Fees: Small Miner Exemption

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed, including the information required by 43 C.F.R. § 3833.1-7(d). Where the applicant fails to pay the rental fee for either of the assessment years, and where complete certificates of exemption are not filed for both years, the claims are properly deemed abandoned and void.

2. Mining Claims: Abandonment--Mining Claims: Rental
or Claim Maintenance Fees: Generally--Mining Claims:
Rental or Claim Maintenance Fees: Small Miner Exemption

In order to qualify for a small miner exemption under the Act of Oct. 5, 1992, a mining claimant must meet all the conditions set out in 43 C.F.R. § 3833.1-6(a), including the statutory requirement that operations be conducted "under a valid notice or plan of operations." Where the U.S. Forest Service determined that no notices were required for groups of claims because only casual operations were involved, the small miner exemption is not authorized, and the claims are properly declared abandoned and void if the required rental fees were not timely paid.

APPEARANCES: William C. Harrison, Esq., Spokane, Washington, for Appellants.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Lookout Mountain Mining & Milling Company et al., have appealed from the May 3, 1994, Decisions of the Idaho State Office, Bureau of Land Management (BLM or Bureau), declaring unpatented mining claims abandoned and void for failure to pay rental fees or submit a certificate of exemption from payment for both the 1993 and 1994 assessment years. ^{1/} By Order of July 26, 1994, the Board granted Appellants' petition for stay of BLM's Decisions.

The Bureau's Decisions declared the claims abandoned and void because various requirements of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992) had not been met. Under the Act, claimants had to pay rental fees in the amount of \$100 per claim for the 1993 and 1994 assessment years on or before August 31, 1993:

[F]or each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314(a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993: Provided further, That for fiscal year 1993, each claimant - (i) that is producing under a valid notice or plan of operation not less than \$1,500 and not more than \$800,000 in gross revenues per year as certified by the claimant from ten or fewer claims; or - (ii) that is performing exploration work to disclose, expose, or otherwise make known possible valuable mineralization on ten or fewer claims under a valid notice or plan of operation; and that has less than ten acres of unreclaimed surface disturbance from such mining activity or exploration work, may elect to either pay the claim rental fee for such year or in lieu thereof do assessment work required by the Mining Law of 1872 (30 U.S.C. 28 - 28e) and meet the filing requirements of FLPMA (43 U.S.C. 1744(a) and (c)) on such ten or fewer claims and certify the performance of such assessment work to the Secretary by August 31, 1993 * * *.

106 Stat. 1378. The Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional \$100 rental fee on or before August 31, 1993. 106 Stat. 1378-79.

^{1/} The appeals and affected claims are detailed in the Appendix.

Implementing Departmental regulations provided as follows:

Mining claim or site located on or before October 5, 1992.
A nonrefundable rental fee of \$100.00 for each mining claim, mill site, or tunnel site, shall be paid on or before August 31, 1993, for each of the assessment years beginning on September 1, 1992, and September 1, 1993, or a combined rental fee of \$200.

43 C.F.R. § 3833.1-5(b) (1993).

The only exemption provided from this rental requirement is the so-called small miner exemption, available to claimants holding 10 or fewer claims on Federal lands who meet all the conditions set forth in 43 C.F.R. § 3833.1-6(a) (1993). Washburn Mining Co., 133 IBLA 294, 296 (1995). The regulations provide that a claimant had to apply for the small miner exemption by filing certificates of exemption for both years on or before August 31, 1993. 43 C.F.R. § 3833.1-7(d) (1993). That regulation provides: "[T]he small miner shall file a separate statement on or before August 31, 1993, supporting the claimed exemption for each assessment year a small miner's exemption is claimed."

In all of the appeals herein the issue is whether BLM properly declared the unpatented mining claims abandoned and void because claimants failed to meet requirements of the small miner exemption from the annual rental fee. 2/ In order to come within the exemption, claimants must file form 3830-1 Certification of Exemption from Payment of Rental Fee, (hereinafter "certificate"), and meet specific regulatory requirements. The printed instructions on the certificate form state in part: "The ten or fewer mining claims listed below are operated under a Notice, Plan of Operations, Special Use Permit, or other State or local permit as described in the regulations at 43 C.F.R. § 3833.1-6, issued by:"

At this point the claimants are asked to list the issuing agency and the serial number or other designation of the notice, plan of operations, or permit.

In the absence of payment of the annual rental fee, the statute and implementing regulations clearly require a timely filing (by August 31, 1993) of a certificate of exemption for both assessment years (ending September 1, 1993, and September 1, 1994), as well as a reference to the notice or plan of operations under which exploration was conducted. See 43 C.F.R. § 3833.1-7(d) (1993); Edwin L. Evans, 132 IBLA 103, 105-06 (1995).

2/ The claims in question were previously owned by a single entity, Silver Bowl, Inc. The claims were quitclaimed from Silver Bowl to the various Appellants in groups of 10 in an effort to bring the claims within the small miner exemption provision.

[1] It is established that an applicant for a small miner exemption from payment of rental fees under the Act was required to file separate, complete certified statements for each of the assessment years (ending September 1, 1993, and September 1, 1994) for which the exemption was claimed, by August 31, 1993. Richard L. Shreves, 132 IBLA 138, 139 (1995); Edwin L. Evans, 132 IBLA at 106. This requirement is explained by the fact that a claimant may elect to file for exemption for 1 year and pay the rental fee for the other. 43 C.F.R. § 3833.1-5(e) (1993).

Where a claimant fails to file an application or qualify for a small miner exemption from the rental fee requirement, failure to pay the rental fee in accordance with the Act and the regulations results in a conclusive presumption of abandonment. Edwin L. Evans, 132 IBLA at 106; William B. Wray, 129 IBLA 173, 175 (1994); Lee H. Rice, 128 IBLA 137, 141 (1994). The Department is without authority to excuse lack of compliance with the rental fee requirement of the Act, to extend the time for compliance, or to afford any relief from the statutory consequences. *Id.* In the absence of timely rental payments or an applicable exemption, BLM properly declares the claims abandoned and void. 43 C.F.R. § 3833.4(a)(2). 3/

The facts of the various appeals vary. We hold that, in the cases where complete certificates of exemption were not filed for both assessment years, there was no claim of exemption made, and the small miner exemption was lost. The Bureau correctly determined in those cases that, as a matter of law, the mining claims then became abandoned and void for

3/ In our order granting a stay in these appeals, we cited 43 C.F.R. § 3833.4(b), which provides:

"(b) Unintentional failure to file the complete information required in * * * 43 CFR 3833.1-7(d) * * * when the document is otherwise filed on time, shall not be deemed conclusively to constitute an abandonment of the claim or site, but such information shall be filed within 30 days of receipt of a notice from the authorized officer calling for such information. Failure to file the information requested by the decision of the authorized officer shall result in the mining claim * * * being deemed conclusively to be abandoned and it shall be void."

We have previously held that filing a certification of exemption for only 1 of the 2 years is properly distinguished from a situation where the applicant failed to provide complete information required to support a certification of exemption. Edwin L. Evans, 132 IBLA at 106 n.3. So it is here also, where claimants effectively failed to file an adequate certification for either assessment year.

It is well established that a statutory requirement may not be treated as a curable defect. See N.T.M., Inc., 128 IBLA 77, 79 (1993); Harvey Clifton, 60 IBLA 29, 39 (1981) (A.J. Burski, concurring). In the present case, the regulatory certification deadline and the associated result of conclusively deeming the claims abandoned if the certification deadline were not met were simply replications of the Act's statutory framework. See Alamo Ranch Co., 135 IBLA 61, 73 (1996).

failure to pay annual rental fees owed for the 1993 and 1994 assessment years by August 31, 1993. 4/

[2] In all of the cases before us, BLM declared the claims abandoned and void for the reason that the claimants had failed to show that they were operating under a notice or plan of operations, as required

4/ Those appeals are William J. Odman, IBLA 94-546, J.S. Hall, IBLA 94-548 (wherein BLM received two "second pages" of the certification form on Aug. 31, 1993); J.L. Harrison, IBLA 94-549 (wherein BLM received on Aug. 31, 1993, one certification form for the assessment year beginning Sept. 1, 1993, and ending Sept. 1, 1994); and Marilyn J. Bashore, IBLA 94-551 (wherein two certification forms were timely filed for the assessment year beginning on Sept. 1, 1993, and ending on Sept. 1, 1994).

In its Decision on the group of claims in Signal Silver-Gold Inc., IBLA 94-531, BLM found that "[a]s of August 31, 1993, [its] records reflect a total of 14 claims recorded under Signal Silver-Gold, Inc." The record contains only one quitclaim mining deed to claimant, from New Hilarity Mining Company, Inc., deeding the 10 claims listed in the Appendix to claimant. In "Appendix A" to his statement of reasons (SOR), counsel explained that claimant abandoned four claims. As "Exhibit Y" counsel submitted a notarized relinquishment form executed by claimant's president on Aug. 30, 1993, indicating that claimant was divesting itself of the Little Joe, Tamarack, Homestake, and Nellie claims (IMC 32028 through IMC 32030, IMC 32032). We are therefore unable to affirm BLM's finding concerning the number of claims and are satisfied that claimant wished to assert ownership over only 10 claims for purposes of the small miner exemption. See Washburn Mining Co., 133 IBLA at 296. However, for reasons set out below, this does not save this group of claims.

In its Decision on the group of claims in Silver Bowl, Inc., IBLA 94-550, BLM states that it received, on Aug. 31, 1993, two certificates for the years 1993 and 1994. No claim names were listed on, or attached to, these certificates, although in the space for claim identification claimant had written "See Sch A attached." On Sept. 15, 1993, claimant filed with BLM a second set of certificates with an attached "Exhibit A" for the claims listed in the Appendix to this Decision, except S.B.-65 (IMC-34642). The Bureau ruled that, since claims could not be added to or subtracted from a claimant's exemption after the close of business on Aug. 31, 1993, the Sept. 15, 1993, certificates could not be considered amendments to the originals. The Bureau rejected claimant's certificates for three reasons: (1) the certificates filed on Aug. 31, 1993, did not apply to any particular claims; (2) the certificates filed on Sept. 15, 1993, were not timely filed; and (3) claimant had no notice or plan of operations with BLM or the U.S. Forest Service (USFS), U.S. Department of Agriculture, on or before Aug. 31, 1993. In view of our holding on the third point, it is unnecessary to consider the first two cited by BLM.

by 43 C.F.R. § 3833.1-6(a)(4)(i) and (ii). Appellants (through common counsel) allege that they attempted to tender such notices and that such notices were either not accepted or regarded as unnecessary by USFS officials:

1. Forest Service not aware of requirement of filing Notice of Intent with Small Miner's Exemption Application and confusion noted in policy attendant this filing and that for the Plan of Operations. This resulted in a refusal to sign the proffered Notices with explanation that only extensive operations required the filing of a Plan of Operations. Consequently, the Notice of Intent was not obtained for any claim and was not faxed with the claimant's applications on August 31, 1994.

2. Notices of Intent were prepared for all claims and the eighty-mile trip to the Wallace Ranger District at Silverton, Idaho, headquarters for the Coeur d'Alene National Forest, made to meet with Forestry District Officials. Arrangements could not be made sooner than the morning of August 31, 1993. On that date, the prepared Notices of Intent were presented for signature; this was followed by a discussion in which all parties exhibited a lack of information as to what was required.

Forestry [personnel] had knowledge of Plans of Operation and stated that such were not required unless major groundbreaking operations were to be undertaken; Notices of Intent were not required for casual operations as their policy officials stated and if claimants were able to determine otherwise, they could return and take the matter up again.

(SOR at 1.)

Counsel asserts that these claims were declared abandoned and void because the USFS was ignorant of the fact that a notice of intent rather than a plan of operations would suffice as one of the requirements for the small miner exemption. Counsel states that as a last resort he "mailed in the small miner's [certificate of] exemption with information to identify the Ranger District that would be administering control over the applicant's work in the absence of having the Notice accepted for filing. * * * The 'issuance' of the Notice was executed orally by Forest Service officials." (SOR at 5.)

The requirement for submission of a notice or plan of operations is a statutory requirement which must be met by the deadline date, August 31, 1993. See Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992). See Ronald E. Milar, 133 IBLA 214, 217 (1995). It is not one of the curable defects specifically listed under 43 C.F.R. § 3833.4(b). Among other enumerated conditions for meeting the small miner exemption, the Act allows a claimant to demonstrate either that he is producing under a valid notice or plan of operations or that he is performing exploration work to disclose possible valuable mineralization.

The governing regulation provides:

(a) In order to qualify for an exemption from the rental fee requirements, a small miner shall meet all the following conditions:

* * * * *

(4) The mining claims shall be under:

(i) One or more Notices or approved Plans of Operations pursuant to Subparts 3802 or 3809 of this title; or

(ii) A Notice or a Plan of Operations issued under parts 9 and 228 of Title 36 of the Code of Federal Regulations for National Park System lands and National Forest System lands respectively; or

(iii) A special use permit issued by a Federal agency for the mining or removal of locatable minerals; or

(iv) A State or local authority mining or reclamation permit if the surface estate of the mining claim is not in Federal ownership.

43 C.F.R. § 3833.1-6(a)(4) (1993) (emphasis supplied). A claimant seeking a small miner exemption for mining claims located on National Forest lands must be under a notice or a plan of operations issued under 36 C.F.R. Part 228 on August 31, 1993. If the claimant does not meet this requirement for an exemption, mining claims are properly declared abandoned and void where no rental has been paid before the deadline date. Robert Limbert, 135 IBLA 364, 367 (1996).

The lands covered by Appellants' claims are evidently under the surface management jurisdiction of the USFS. Under regulations governing operations on claims on lands the surface of which is managed by USFS, a proposed plan of operations need only be submitted if the District Ranger determines that such operations will likely cause significant disturbance of surface resources. 36 C.F.R. § 228.4(a) Other circumstances in which a notice of intent will suffice, and no plan of operations need be submitted, are set out at 36 C.F.R. § 228.4(a)(1). If a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required. 36 C.F.R. § 228.4(a)(2)(iii).

Although they filed notices of intent on August 31, 1993, Appellants could not reasonably have expected that USFS would review them and decide on that date whether or not plans of operations need be submitted, as the regulations grant USFS 15 days from date of receipt to analyze the notice.

See Ronald E. Milar, 133 IBLA at 217-18. We do not accept Appellants' argument that USFS ruled on the acceptability of Appellants' submission orally before the deadline date. As a result, it cannot be said that the claims were under either a Notice or a Plan of Operations issued under 36 C.F.R. Part 228 on the deadline date.

We recognize that the Act placed a burden on claimholders whose claims were not "under" either "approved Plans of Operations" or "Notices" as of the date of the Act to bring their claims into such status prior to the August 31, 1993, deadline. 5/ However, the USFS regulations setting out requirements for notices of intent/plan of operations were continuously in effect from their promulgation. Therefore, we perceive no injustice in the situation: Congress granted an exemption from the rental fee requirements for those miners who had previously complied with regulations governing mining plans or who were able to complete compliance prior to the deadline. 6/ Appellants simply failed to avail themselves of the exemption by failing to take timely action to ensure that their plans of operations or notices would be approved, so that the status of filing required for their claims would be established as of the deadline. 7/

5/ The Act allowed claimants from Oct. 5, 1992, to Aug. 31, 1993, to bring their claims into compliance with appropriate plan of operations/notice of intent requirements.

6/ The Bureau announced its interpretation of the statute on this question in the Preamble to 43 C.F.R. § 3833.1-6 (1993): "One must be under a valid plan or notice in order to qualify for the small miner exemption and if no significant disturbance is taking place, it is not likely that the claimant would be required to file a plan." 58 Fed. Reg. 38190 (July 15, 1993). The consequences of not being required to file a plan would be that no small miner exemption could be granted:

"One comment asked whether miners whose mining activity is not at the plan or notice level can be eligible for the small miner exemption. The answer is no because, as stipulated in this section and the Act, the activity must be at plan or notice level as defined by the surface managing agency."

58 Fed. Reg. 38192 (July 15, 1993).

7/ The Bureau also announced its interpretation of the statute on this question in the Preamble to 43 C.F.R. § 3833.1-6 (1993):

"One comment asked whether it is possible that a plan of operations that has been submitted but not approved can satisfy the requirement for a small miner exemption. The answer is no because the statutory language refers to 'valid' plans of operations. A plan that has not been approved cannot be considered valid."

58 Fed. Reg. 38192 (July 15, 1993).

Even if we could disregard the foregoing, it would remain to be determined whether Appellants had met the other requirements for obtaining an exemption, including the minimum and maximum yearly production dollar amounts from each group of claims, as BLM did not reach that question.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

APPENDIX

IBLA 94-529	Lookout Mountain Mining & Milling Co.	Black #1 (IMC-31880) Black Diamond #1 (IMC-31882) Eve (IMC-31884) Elk #1 (IMC-31893) Elk #8 (IMC-31900) Silver #1 (IMC-31907) Silver #6 (IMC-31902) Silver #9 (IMC-31910) Silver #13 (IMC-31914) Silver #19 (IMC-31920)
IBLA 94-531	Signal Silver-Gold, Inc.	Silver Certificate Nos. 1 through 6 (IMC-32039 through -44) Signal (IMC-32045) Taurus (IMC-32046) Vegas (IMC-32047) Ted #5 (IMC-32035)
IBLA 94-542	Big Sky Silver	Lucky Lode (IMC-34560) Silver Lode (IMC-34564) King (IMC-34569) Mudge (IMC-34572) Ruby (IMC-34575) Reindeer (IMC-34579) Blizzard (IMC-34582) Skookum (IMC-34585) Blue Jay (IMC-34588) Black Bear-1 (IMC-34667)
IBLA 94-543	Resource Engineering, Inc.	S B-3 (IMC-34592) S B-6 (IMC-34595) S B-9 (IMC-34598) S B-16 (IMC-34601) S B-19 (IMC-34604) S B-22 (IMC-34607) S B-29 (IMC-34610) S B-37 (IMC-34616) S B-61 (IMC-34638) S B-66 (IMC-34643)
IBLA 94-545	V.A. Nash	S B-2 (IMC-34591) S B-5 (IMC-34594) S B-8 (IMC-34597) S B-15 (IMC-34600) S B-18 (IMC-34603) S B-21 (IMC-34606) S B-28 (IMC-34609) S B-31 (IMC-34612) S B-36 (IMC-34615) S B-40 (IMC-34618)

IBLA 94-529

IBLA 94-546 William J. Odman

Yellow Jacket (IMC-34586)
Cabin Lode (IMC-34589)
A.G.-3 and A.G.-4 (IMC-34698-99)
A.G.-6 and A.G.-7 (IMC-34701-02)
A.G.-9 (IMC-34704)
P.B.-1 through P.B.-3 (IMC-34705-07)

IBLA 94-547 William E. Davies

Mucker (IMC-34571)
Richwine (IMC-34574)
Summit (IMC-34578)
Moonlight (Am'd'd) (IMC-34581)
New Sunshine (IMC-34584)
Baldie Lode (IMC-34587)
Portal Frac. (IMC-34654)
Silver Valley-2 (IMC-34670)
Silver Stork-1 (IMC-34673)
Silver Stork-4 (IMC-34676)

IBLA 94-548 J.S. Hall

S.B.-70 (IMC-34645)
S.B.-7 (IMC-34596)
S.B.-14 (IMC-34599)
S.B.-17 (IMC-34602)
S.B.-20 (IMC-34605)
S.B.-23 (IMC-34608)
S.B.-30 (IMC-34611)
S.B.-35 (IMC-34614)
S.B.-42 (IMC-34620)
S.B.-45 (IMC-34623)

IBLA 94-549 J.L. Harrison

Bryn Mawr (IMC-34551)
Bullion (IMC-34552)
Red Jacket (IMC-34553)
Magpie (IMC-34554)
Mammoth (IMC-34555)
Mascot (IMC-34556)
Tiger (IMC-34557)
Badger (IMC-34558)
Beaver (IMC-34559)
Forks (IMC-34566)

IBLA 94-550 Silver Bowl, Inc.

Silver Bowl #1 (IMC-34590)
S.B.-48 (IMC-34626)
S.B.-51 (IMC-34629)
S.B.-55 (IMC-34632)
S.B.-58 (IMC-34635)
S.B.-62 (IMC-34639)
S.B.-65 (IMC-34642)
S.B.-78 (IMC-34648)

IBLA 94-529

IBLA 94-551 Marilyn J. Bashore

Jack (IMC-34568)
Mohawk Lode (IMC-34561)
Gigubre (IMC-34567)
Lobdell (IMC-34570)
Queen (IMC-34573)
Snowshoe (IMC-34576)
Big Creek Star (IMC-34580)
P.B.-2 (IMC-34706)
Fault (IMC-17730)
Lindy (IMC-34583)

IBLA 94-554 H.K. Fox

Silver Stork-2 (IMC-34674)
West Point (IMC-17725)
Cedar (IMC-17728)
Deacon (IMC-17731)
Silver Pirate-3 (IMC-34691)
Gettysburg (IMC-17735)
Red Rock Lode (IMC-34562)
Trail Load (IMC-34565)
A.G.-5 (IMC-34700)
A.G.-8 (IMC-34703)

140 IBLA 28